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No. 01-1263

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF MISSISSIPPI, ST. JAMES CHURCH, AND JERRY MCBRIDE,

Petitioners,

v.

JULIE MABUS,

Respondent.

On Petition For Writ Of Certiorari To The Hinds County Circuit Court Of Mississippi, First Judicial District

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES E. ROSS
Counsel of Record
BRENDA CURRIE
WISE CARTER CHILD & CARAWAY
600 Heritage Building
401 East Capitol Street
Jackson, Mississippi 39201
(601) 968-5500

Attorneys for Petitioner, the Protestant Episcopal Church in the Diocese of Mississippi.

DORRANCE AULTMAN
AULTMAN, TYNER, RUFFIN & YARBOROUGH, LTD.
315 Hemphill Street
P.O. Box 750
Hattiesburg, Mississippi 39403
(601) 583-2671

Attorney for Petitioner, St. James Church

ROBERT MALOUF
202 North Congress Street, Suite 502
Jackson, Mississippi 39201
(601) 354-9400

Attorney for Petitioner, Jerry McBride

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REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners, The Protestant Episcopal Church in the Dioceses of Mississippi (individually referred to as "Diocese"), St. James Church (individually referred to as "Church"), and Jerry McBride (individually referred to as "McBride"), submit this Reply in Further Support of their Petition for Writ of Certiorari to the Hinds County Circuit Court of Mississippi, First Judicial District.

I. JURISDICTION

Respondent challenges this Court's jurisdiction by asserting that the orders below do not constitute a final judgment. Respondent is incorrect. Respondent's position is inconsistent with this Court's interpretation of the finality provisions of 28 U.S.C. § 1257 as set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).[1] When a

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[1] This Court recognizes four categories in which review by this Court is allowed despite further proceedings pending in the courts below. Those categories are as follows:

> (1) there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained.
>
> (2) the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings.
>
> (3) the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.

lower court decision irreparably impairs First Amendment rights, the decision is final as to those rights, even if further proceedings may take place in the lower court. *See Fort Wayne Books, Inc. v. Indiana, et al.*, 489 U.S. 46, 55 (1989); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 44 (1977) (*per curium*); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246-247 (1974).

Ms. Mabus' Complaint makes clear that she seeks to impose liability on these Petitioners *exclusively* because of their religious status and affiliation. (App. at 14-24) No other basis for her claims is stated in her Complaint, and Ms. Mabus has admitted that she would have no cause of action absent the religious status of these Petitioners. (App. at 25-27) By denying the Petitioners' Motion to Dismiss, as Revised, and by denying interlocutory review of that order, the courts below finally and conclusively

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> (4) the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); *see, e.g., Florida v. Thomas*, 532 U.S. 774 (2001).

determined that civil liability can be based exclusively upon religious status and/or affiliation.

Through these decisions, the courts below also finally and conclusively determined that Petitioners would be subject to the discovery process in this matter, which encroaches upon the First Amendment rights of these Petitioners. The decisions of the courts below allow Respondent to probe into the canons, doctrines, polity, beliefs, and practices of these Petitioners without restraint.[2] The very process of discovery and a trial in this matter, regardless of the ultimate outcome, will cause a direct violation of the First Amendment rights that cannot be remedied through the appellate process.[3] It is well recognized by this Court that First Amendment rights can be irreparably harmed through the very process of discovery. *See National Assoc. for Advancement of Colored People v. State of Alabama*, 357 U.S. 449 (1959) (holding that compelling disclosure of members and agents was a violation of First Amendment rights to association). Compelling religious figures to provide testimony as to their

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[2] Ms. Mabus has made clear her intend to build her case by deposing the bishop and several priests of the church and the Dioceses, and probing into the canons, doctrines, polity, beliefs, and practices. (App. at 28-30) Furthermore, Ms. Mabus has clearly stated her intent to put on evidence in a court of law as to those canons, doctrines, polity, and beliefs through "experts." (App. at 26) As is fully set forth in the Petition, the final and conclusive impact of the lower courts' rulings was expressed by the Chief Justice of the Mississippi Supreme Court, Justice Pittman, in the Separate Statement on Order. (App. at 9-10)

[3] The fact that the actual imposition of civil liabilities for the claims asserted and pursued by Ms. Mabus would simply be another First Amendment violation, above and beyond the process itself.

beliefs, their canons, and their practices (which do not violate any duty generally applicable to other persons) intrudes upon these Petitioners' free exercise rights and excessively entangles the courts with religion. Requiring such testimony itself is harm that cannot be repaired at a later date.

More fundamentally, regardless of the outcome, the state court in Mississippi will decide the proper role for priests in activities not actionable against other persons. Such amounts to state regulation of religion. Ms. Mabus, thus, is incorrect in her argument that it is possible that the trial judge or a jury could find in favor of the Petitioners without ever reaching the federal issue, because by the time this occurs, the federal rights associated with this federal issue will be destroyed.

In a related argument, Ms. Mabus asserts that if Petitioners prevail on their motion for summary judgment, the First Amendment will likewise be moot. Such is simply not the case. On April 2, 2002, the Mississippi Supreme Court entered an order staying all state court proceedings pending this Court's decision on certiorari. (A copy of this order is included in the Appendix to this Reply) Prior to the entry of the stay order, counsel for Ms. Mabus refused to respond to Petitioners' request for summary judgment absent further discovery, including the deposition of several priests and the Bishop. Furthermore, Petitioners' motion for summary judgment only addresses some of the claims alleged in Ms. Mabus' Complaint, while Petitioners' First Amendment defense is applicable and dispositive as to all of Ms. Mabus' claims.

In sum, despite the fact that further proceedings remain in this case, the issues related to the First Amendment rights of these Petitioners have been finally and

conclusively determined. Given the federal policy involved and the irreparable harm that will occur if the First Amendment issues are not addressed by this Court, this Court possesses the appropriate jurisdiction to hear the federal issues presented in the Petition for Writ of Certiorari.

II. RESPONDENT'S COMPLAINT DOES NOT SEEK TO IMPOSE GENERALLY APPLICABLE TORT LAW

Respondent asserts throughout her opposition that Respondent is not alleging that Petitioners owe a special duty to Respondent and that she only seeks to impose general Mississippi civil law tort liability. In making this argument, Ms. Mabus ignores her own pleadings and the representations made by her counsel in prior statements on the record. Ms. Mabus' Complaint is replete with assertions that religious affiliation creates special legal duties. Examples of such assertions are set forth in footnote 2 of the Petition and will not be repeated herein. Ms. Mabus cannot now deny the words of her own Complaint.[4] Likewise, the explicit concession of Ms. Mabus,

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[4] The courts below, and this Court, are bound by the allegations of the Complaint and are not free to speculate that the Plaintiff "might" be able to state a claim if given an opportunity to redraft her complaint. *See, e.g., Minor v. Engineering Service Co., Inc.*, 304 So. 2d 45 (Miss. 1974); *Sinclair Refining Co. v. Tompkins*, 117 F.2d 596 (5th Cir. 1941); *Macias v. Raul*, 23 F.3d 94, 97 (5th Cir. 1994); 5 A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1368 (2d ed. 1990); *Henthorn v. Department of Navy*, 29 F.3d 682, 687-88 (D.C. Cir. 1994). Petitioners are entitled to know, from the complaint, what plaintiff is claiming so they can adequately respond and defend. *See, e.g., Estate of Stevens v. Wetzel*, 762 So. 2d 293 (Miss.

through her counsel, that no cause of action exists absent Father McBride's status as a priest, is set forth in footnote 1 of the Petition.

Respondent asserts that Petitioners' case is identical to a hypothetical case where a priest commits murder and then seeks First Amendment protection from state criminal law proceedings because the act was simultaneously a violation of The Ten Commandments. (Opposition Brief at 7-8) Respondent further argues that the issue presented in this case is the same as that presented in the recent Florida Supreme Court Decision of *Malicki v. Doe*, ___ So. 2d ___, 2002 W.L. 390021 (Fl. 2002). Respondent's assertion and reliance upon cases like *Malicki* demonstrate her flawed reasoning. Murder is a crime generally applicable to all. Likewise, the *Malicki* case concerns a member of the clergy who "fondled, molested, touched, abused and sexually assaulted and/or battered" a minor child. All of these activities constitute tortious (and criminal) conduct, which give rise to a cause of action based upon civil law against all persons, clergy or non clergy. No reliance on religious status is necessary to make these activities tortious. As explained fully in the Petition, this is not the situation in the case *sub judice*.[5]

To emphasize, Petitioners herein are *not* seeking an exemption from civil law duties generally applicable to

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2000); *New York Indem. Co. v. Myers*, 138 So. 334 (Miss. 1931); *General Star Idem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 950 (5th Cir. 1999).

[5] Under Mississippi law, the act of secretly recording a conversation without another's consent or not disclosing that someone else is taping a conversation, is neither unlawful nor tortious, *see Attorney M. v. The Mississippi Bar*, 621 So. 2d 220 (Miss. 1992), a point which Respondent concedes.

all persons. Petitioners only seek protection from being the target of civil liability based *solely* upon religious status.

III. ADJUDICATION OF RESPONDENT'S COMPLAINT REQUIRES ENTANGLEMENT IN ECCLESIASTICAL MATTERS OUTSIDE THE JURISDICTION OF CIVIL COURTS

Respondent also argues throughout her opposition that she is not alleging a violation of an ecclesiastical law and that no interpretation of ecclesiastical doctrines or beliefs will be necessary to adjudicate this matter. Again, Respondent ignores her pleadings and the prior, on-the-record representation of her counsel.

The Complaint states as follows:

> St. James and Diocese knew or should have known that Father Jerry McBride could not be trusted to follow the Cannons (sic) of the Episcopal religion and maintain the confidence and/or trust of parishioners.

(App. at 21) Likewise, Respondent asserts,

> St. James and Diocese . . . failed to take appropriate steps to supervise Father McBride's interaction with parishioners and they continued to enable his service as a spiritual leader of St. James Episcopal Church.

(App. at 21) The only reasonble interpretation of these assertions is that Father McBride violated the Episcopal canons, and that the Diocese and the Church were negligent for not insuring that Father McBride complied with the canons. Likewise, Respondent's Complaint states throughout that Father McBride was acting as a "spiritual leader." (App. at 17-21) Determining if Father McBride violated any duties as a "spiritual leader," necessarily

involves the state probing into the episcopal beliefs and practices to ascertain their scope and limits, or alternatively, the state must impose its own limits on a priest's spiritual authority. Either alternative violates the First Amendment.

Finally, the words of Ms. Mabus' counsel, in the record before the trial court, could not be clearer as to how ecclesiastical matters will be involved. Quoting Ms. Mabus' counsel,

> [W]hether the conduct at issue in this case involves the interpretation of religious doctrine . . . we establish that by calling their witnesses up there and saying, Oh, whether or not to reveal the confidences of a confession, that's purely a church matter, and then *we call experts that get up there, Episcopalian experts that understand and are familiar with their doctrines, and say, well no actually, it's just the opposite.* . . .

(App. at 26) (emphasis added).

IV. PETITIONERS WILL SUFFER IRREPARABLE HARM

Respondent also argues that there will be no harm in requiring Petitioners to go through discovery and a trial before deciding the First Amendment issues, and thus, the Petition is not ripe for decision. Petitioners have addressed much of this argument in its response to Respondent's jurisdictional challenge and thus will only touch on additional arguments in this section.

The interpretation of ecclesiastical law is outside the scope of the civil court's jurisdiction, *see Watson v. Jones*,

80 U.S. 679, 733 (1871), and will cause the state courts to become excessively entangled with religion. *See Jones v. Wolf*, 433 U.S. 592, 602 (1979). As explained in the Petition, such is a *per se* constitutional violation that cannot be remedied after the fact.

Moreover, allowing these claims to go forward will constitute a *de facto* prior restraint on Petitioners' First Amendment rights by restricting their religious freedom to interpret church doctrine and act in accordance therewith. Prior restraints, by definition, involve "immediate and irreversible sanctions" that freeze First Amendment rights. *Nebraska Press Assn. v. Stewart*, 427 U.S. 539 (1976). While these matters are pending, Petitioners are uncertain whether, as religious persons and institutions, they may determine proper priestly behavior in areas not actionable against ordinary citizens, or whether the courts will do so. Further, any interpretation of their religious doctrine (and practices stemming therefrom) by Petitioners during the pendency of this action may be discoverable and admissible as to the legal standard of care for a priest. Thus, the Diocese and the Church are not free to interpret their religious doctrine and advise their clergy and parishioners in accordance therewith without fear that such interpretation and advice may be used against them in these proceedings or in another action. Their ability to exercise their First Amendment rights has been frozen, or at least significantly chilled, just as in free speech cases involving prior restraints. Thus, this Court should grant certiorari to prevent this irreparable harm.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari and herein, this Court has jurisdiction, the questions are accurately presented, and this Court should grant the Writ of Certiorari.

Respectfully submitted,

CHARLES E. ROSS
Counsel of Record
BRENDA CURRIE
WISE CARTER CHILD & CARAWAY
600 Heritage Building
401 East Capitol Street
Jackson, Mississippi 39201
(601) 968-5500

Attorneys for Petitioner,
the Protestant Episcopal Church
in the Diocese of Mississippi

DORRANCE AULTMAN
AULTMAN, TYNER, RUFFIN &
YARBOROUGH, LTD.
315 Hemphill Street
P.O. Box 750
Hattiesburg, Mississippi 39403
(601) 583-2671

Attorney for Petitioner,
St. James Church

ROBERT MALOUF
202 North Congress Street,
Suite 502
Jackson, Mississippi 39201
(601) 354-9400

Attorney for Petitioner,
Jerry McBride

Serial: **94856**

IN THE SUPREME COURT OF MISSISSIPPI

No. 2001-M-01558

JULIE MABUS

v.

ST. JAMES EPISCOPAL CHURCH, EPISCOPAL DIOCESE OF MISSISSIPPI, INC., JERRY MCBRIDE AND JOHN DOES 1-10

ORDER

(Filed Apr. 2, 2002)

This matter is before the Court, sitting en banc, on the Motion for Stay of Proceedings Pending Certiorari to the United States Supreme Court filed by the Episcopal Diocese of Mississippi, Inc. Also before the Court are the Joinder in the motion to stay filed by St. James episcopal Church and Jerry Mcbride and the Plaintiff's Response in Opposition to Defendant's Motion for Stay of Proceedings filed by Julie Mabus. After due consideration, the Court finds that the motion should be granted and that proceedings in the trial court should be stayed pending a decision on the petition for writ of certiorari presently pending in the United States Supreme Court. The stay will be immediately lifted if the petition for writ of certiorari is denied.

IT IS THEREFORE ORDERED that the Motion for Stay of Proceedings Pending Certiorari to the United States Supreme Court filed by the Episcopal Diocese of Mississippi, Inc., is granted.

SO ORDERED, this the 2nd day of April, 2002.

/s/ James W. Smith, Jr.
JAMES W. SMITH, JR.,
PRESIDING JUSTICE
FOR THE COURT

TO GRANT: PITTMAN, C.J., SMITH, P.J., WALLER, COBB, DIAZ AND CARLSON, JJ.

TO DENY: MCRAE, P.J., AND EASLEY, J.

NOT PARTICIPATING: GRAVES, J.